No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	3
STATEMENT	6
SUMMARY OF ARGUMENT	11
ARGUMENT	15
FLORIDA UNARMED ROBBERY IS NOT A "VIOLENT FELONY" UNDER THE ELEMENTS CLAUSE OF THE ARMED CAREER CRIMINAL ACT	15
A. In the ACCA, "Physical Force" Means "*Violent* Force"	18
1. "*Violent* Force" Requires a "Substantial Degree of Force"	19
2. The Government's "Capable" Test Disregards that "*Violent* Force" Requires a "Substantial Degree of Force"	22
3. A "Minor" Use of Force Is Not "*Violent* Force"	25
B. Florida Robbery Lacks "*Violent* Force" as an Element Because the Offense Requires Only a Slight Degree of Force	26

TABLE OF CONTENTS—Continued

Page

1. Florida Robbery Can Be Committed by *Any* Degree of Force, Provided it Overcomes Resistance 28
2. Physical Resistance by the Victim May Be Slight 31
3. Florida Robbery May Be Committed by Only the Slight Degree of Force Necessary to Overcome Slight Resistance 33
4. The Government Acknowledges That Conduct Materially Indistinguishable From, and Even Less Forceful Than, Conduct Criminalized in Florida Does Not Involve "*Violent* Force" 37

C. Treating Florida Robbery as an ACCA "Violent Felony" Would Conflict with Congress' Purpose of Targeting Only Those Offenders Likely to Commit Gun Violence 41

CONCLUSION 44

APPENDIX

Appendix A: Federal & State Statutes 1a

Appendix B: *State of Florida v. Damian Dawkins* 6a

TABLE OF AUTHORITIES

CASES — Page

Adams v. State, 295 So. 2d 114 (Fla. Dist. Ct. App. 1974) 31

Bates v. State, 465 So. 2d 490 (Fla. 1985) 29

Begay v. United States, 553 U.S. 137 (2008) ..... *passim*

Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011) 40

Carter v. United States, 530 U.S. 255 (2000) 26

Colby v. State, 35 So. 189 (Fla. 1903) 33, 39

Derby v. United States, 564 U.S. 1047, 131 S. Ct. 2858 (2011) 4

Descamps v. United States, 570 U.S. 254 (2013) 11, 16, 17

Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988 (2017) 22

Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) 24, 25, 26

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) 18

Hayes v. State, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001) 40, 41

In re Standard Jury Instructions in Criminal Cases, 543 So. 2d 1205 (Fla. 1989) 31

Johnson v. Fankell, 520 U.S. 911 (1997) 17

Johnson v. State, 612 So. 2d 689 (Fla. Dist. Ct. App. 1993) ("*Winston Johnson*") 35, 36

TABLE OF AUTHORITIES—Continued

Page

Johnson v. United States, 559 U.S. 133 (2010) (*"Curtis Johnson"*) ..... *passim*

Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015) (*"Samuel Johnson"*) 3, 4, 16

Leocal v. Ashcroft, 543 U.S. 1 (2004) 20

Martin v. State, 129 So. 112 (Fla. 1930) 29

Mathis v. United States, 579 U.S. ___, 136 S. Ct. 2243 (2016) 8

McCloud v. State, 335 So. 2d 257 (Fla. 1976) ..... *passim*

Mims v. State, 342 So. 2d 116 (Fla. Dist. Ct. App. 1977) 10, 31

Moncrieffe v. Holder, 569 U.S. 184 (2013) 11, 17, 18

Montsdoca v. State, 93 So. 157 (Fla. 1922) ..... *passim*

Pippin v. State, 136 So. 883 (Fla. 1931) 27

Robinson v. State, 692 So. 2d 883 (Fla. 1997) ..... *passim*

Rockmore v. State, 140 So. 3d 979 (Fla. 2014) 27

Royal v. State, 490 So. 2d 44 (Fla. 1986) 27

Rumph v. State, 544 So. 2d 1150 (Fla. Dist. Ct. App. 1989) 38, 39

S.W. v. State, 513 So. 2d 1088 (Fla. Dist. Ct. App. 1987) 31

Sanders v. State, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000) 35, 36

Santiago v. State, 497 So. 2d 975 (Fla. Dist. Ct. App. 1986) 30

TABLE OF AUTHORITIES—Continued

Page

Sessions v. Dimaya, 584 U.S. ___, 138 S. Ct. 1204 (2018) 6

Simmons v. State, 25 So. 881 (Fla. 1899) 27

Standard Jury Instructions in Criminal Cases (95-2), 665 So. 2d 212 (Fla. 1995) 31

Standard Jury Instructions in Criminal Cases (97-1), 697 So. 2d 84 (Fla. 1997) 31

State v. Dawkins, Case No. 17003199 (Fla. Cir. Ct. 2017) 34, 39

State v. Hearns, 961 So. 2d 211 (Fla. 2007) 28

Taylor v. United States, 495 U.S. 575 (1990) 17

United States v. Castleman, 572 U.S. ___, 134 S. Ct. 1405 (2014) ..... *passim*

United States v. Dowd, 451 F.3d 1244 (11th Cir. 2006) 8, 9

United States v. Fritts, 841 F.3d 937 (11th Cir. 2016) 9, 10, 32

United States v. Gardner, 823 F.3d 793 (4th Cir. 2016) 37, 38, 39, 41

United States v. Geozos, 870 F.3d 890 (9th Cir. 2017) 10, 32, 36

United States v. Jarmon, 596 F.3d 228 (4th Cir. 2010) 4

United States v. Lee, 886 F.3d 1161 (11th Cir. 2018) 32

TABLE OF AUTHORITIES—Continued

Page

United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011) 7, 8, 9

United States v. Winston, 850 F.3d 677 (4th Cir. 2017) 37, 39, 40, 41

United States v. Yates, 866 F.3d 723 (6th Cir. 2017) 37, 39, 40, 41

Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2016) 16

STATUTES

18 U.S.C. § 16(a) 20

18 U.S.C. § 921(a)(33)(A)(ii) 25

18 U.S.C. § 922(g) 3, 15, 43, 44

18 U.S.C. § 922(g)(1) 6

18 U.S.C. § 922(g)(8) 24

18 U.S.C. § 922(g)(8)(C)(ii) 23

18 U.S.C. § 922(g)(9) 25

18 U.S.C. § 924(a)(2) 3, 6, 16

18 U.S.C. § 924(e) 3, 6, 15, 16

18 U.S.C. § 924(e)(2) 3

18 U.S.C. § 924(e)(2)(B) 16

18 U.S.C. § 924(e)(2)(B)(i) ..... *passim*

18 U.S.C. § 924(e)(2)(B)(ii) 4, 16

18 U.S.C. § 3553(a) 44

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1254(1) 1

Fla. Stat. § 812.13 ..... *passim*

Fla. Stat. § 812.13(1) 28

Fla. Stat. § 812.13(2)(c) 7

Fla. Stat. § 812.13(3)(b) 27

Fla. Stat. § 812.131 30

OTHER AUTHORITIES

4 W. Blackstone, *Commentaries on the Laws of England* (1769) 26

4 *Wharton's Criminal Law* (15th ed. 2017) 29

19 Oxford English Dictionary (2d ed. 1989) 5, 20

Black's Law Dictionary (9th ed. 2009) 5, 19, 20

Fla. Std. Jury Instr. (Crim.) 15.1 (2018) 13, 31

Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84 (1954) 29

Webster's New International Dictionary (2d ed. 1954) 5, 19, 20

OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit (J.A. 28-40) is unpublished but reported at 684 F. App'x 870. The judgment of the district court (J.A. 20-27) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on April 6, 2017, and Justice Thomas extended the time to file a petition for a writ of certiorari to August 4, 2017. The petition was timely filed that day and granted on April 2, 2018.

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act ("ACCA"), a "violent felony" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

At the time of Petitioner's conviction in 1997, § 812.13 of the Florida Statutes provided:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the

money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Additional statutory provisions relevant to this case are included in Appendix A.

INTRODUCTION

The Armed Career Criminal Act ("ACCA") mandates at least 15 years in prison and permits a sentence of up to life for individuals convicted of certain firearm possession offenses normally subject to a 10-year maximum. 18 U.S.C. §§ 922(g), 924(a)(2), (e). Given the ACCA's harsh penalties, Congress targeted only the most dangerous of these offenders by reserving the ACCA enhancement for those with three prior "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(2). In Congress' view, such a criminal history reflects "an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 146 (2008). The question presented here is whether the Florida offense of unarmed robbery is a qualifying "violent felony."

In *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), this Court declared unconstitutionally vague one of the ACCA's three "violent felony" definitions. Known as the "residual clause," that amorphous definition had emerged over time as a capacious catchall, sweeping in garden-variety property crimes, including petty theft and non-forceful robbery offenses. In one case, a court of appeals even held that "theft of over $5 in money or goods from another person—in

other words, pickpocketing"—satisfied the residual clause, prompting the eventual author of *Samuel Johnson* to deride the "apparent view that Oliver Twist was a violent felon." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (mem.) (Scalia, J., dissenting from denial of certiorari) (citing *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010)).

While *Samuel Johnson* ultimately excised the residual clause, it left intact the ACCA's two remaining "violent felony" definitions. 135 S. Ct. at 2563. One enumerates a handful of "violent felon[ies]," but robbery is not among them. 18 U.S.C. § 924(e)(2)(B)(ii). The other, known as the "elements clause," encompasses felonies that have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). For a robbery offense to qualify as an ACCA predicate today, it must satisfy that definition. In stark contrast to the ACCA's inscrutable residual clause, the elements clause is circumscribed, intelligible, and amenable to judicial interpretation.

Indeed, this Court authoritatively interpreted the elements clause in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). Applying ordinary tools of statutory construction, the Court found it "clear" from both the text and context that the phrase "physical force" in the ACCA requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The Court explained that "*violent* force" "connotes a substantial degree of force"—*i.e.*, "extreme" force, "strong physical force," "the exertion of great

physical force or strength," or force that is "furious; severe; vehement." *Id.* (quoting Webster's New International Dictionary 2846 (2d ed. 1954); 19 Oxford English Dictionary 656 (2d ed. 1989); and Black's Law Dictionary 1706 (9th ed. 2009)).

This case calls for a straightforward application of *Curtis Johnson*. The Florida Supreme Court has repeatedly held that, to commit robbery in Florida, "[t]he degree of force used is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). Although the force used must overcome some resistance by the victim, *Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997), Florida law makes clear that the victim's resistance itself may be slight, requiring only a slight degree of force to overcome it. Accordingly, robbery can occur in Florida where a pickpocket caught in the act merely seeks to pull free from the victim's grasp. And robbery can also occur where the offender does no more than grab cash from someone's closed fist, tearing the bill without touching the person. The slight degree of force used in such cases falls well short of "*violent* force," as defined in *Curtis Johnson*.

The Court should not expand the elements clause to rebrand Oliver Twist a "violent felon." Imposing the ACCA enhancement based on garden-variety, petty criminal conduct would contravene both *Curtis Johnson* and the statute's purpose of preventing gun violence. Of course, "Congress remains free at any time" to revise the ACCA; for example, it might "add more crimes to its list," "write a new residual clause that

affords the fair notice lacking" before, or include felonies "carrying a prison sentence of a specified length." *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). But unless and until Congress does so, faithfully applying the statutory text as interpreted by *Curtis Johnson* compels the conclusion that Florida robbery does not trigger the ACCA's enhanced penalties.

STATEMENT

1. In 2016, Petitioner pleaded guilty in the Southern District of Florida to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). In the pre-sentence investigation report ("PSI"), the probation officer recommended that Petitioner receive an enhanced sentence under the ACCA, subjecting him to a 15-year mandatory minimum and a maximum sentence of life. 18 U.S.C. § 924(e). The probation officer asserted the enhancement applied because Petitioner had three prior "violent felon[ies]," one of which was a 1997 Florida conviction for unarmed robbery under Fla. Stat. § 812.13. With the ACCA enhancement, Petitioner's advisory guideline range was 180-188 months. Without it, his advisory guideline range was 70-87 months, and his statutory maximum was 10 years. 18 U.S.C. § 924(a)(2).

Petitioner objected to the ACCA enhancement. He argued that his 1997 robbery conviction did not qualify as a "violent felony" under the ACCA's elements clause

because Fla. Stat. § 812.13 did not have as an element "physical force," 18 U.S.C. § 924(e)(2)(B)(i), which this Court had defined as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Petitioner relied on Florida Supreme Court decisions establishing that, to commit robbery "by force" under Fla. Stat. § 812.13, "[t]he degree of force used is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976).

In response, the government introduced the underlying charging document and judgment, reflecting that Petitioner's conviction was pursuant to Fla. Stat. § 812.13(2)(c), which prohibits robbery without a firearm or weapon. J.A. 9-19. Although that was the least serious form of robbery under the statute, the government argued that circuit precedent in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) foreclosed Petitioner's argument that his unarmed robbery conviction did not satisfy the elements clause. The government did not address Petitioner's argument as to the import of the Florida Supreme Court's decisions in *Montsdoca* and *McCloud*. Instead, it cited that court's later decision in *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which adhered to *Monstdoca* and *McCloud* but emphasized that Florida robbery requires force necessary to overcome a victim's resistance. The government argued that the amount of force necessary to overcome resistance necessarily satisfied *Curtis Johnson*'s definition of "physical force."

The district court sustained Petitioner's objection to classifying his robbery conviction as a "violent felony," but on a different ground. Specifically, the court relied on the particular facts of Petitioner's robbery offense set forth in the PSI. J.A. 30. Without the ACCA enhancement, the 15-year mandatory minimum became a 10-year statutory maximum, and Petitioner's guideline range became 70-87 months. The court sentenced Petitioner to 73 months. J.A. 20-21.

2. The government appealed. It first argued that, because the Florida robbery statute was "indivisible" under *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), the district court erred by examining the particular facts of Petitioner's offense instead of the statutory elements of robbery. Second, the government argued that binding circuit precedent, not only *Lockley* but also *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (holding that Florida armed robbery qualified as a "violent felony"), confirmed that Petitioner's Florida unarmed robbery conviction categorically had "physical force" as an element. According to the government, *Robinson* supported that conclusion because Florida robbery requires force necessary to overcome the victim's resistance.

Petitioner responded that neither *Lockley* nor *Dowd* had considered any relevant Florida case law or determined the least culpable conduct, as this Court's precedents require. As a result, Petitioner argued, those circuit precedents were neither controlling nor persuasive. He underscored that, under Florida Supreme Court precedent, the degree of force necessary

to overcome resistance was "immaterial," *Montsdoca*, 93 So. at 159, and "[a]ny degree of force" sufficed for a robbery conviction, *McCloud*, 335 So. 2d at 258. And, he noted, post-*Robinson* case law in Florida confirmed that the victim's resistance could be slight, and only slight force is necessary to overcome slight resistance. In light of that case law, Petitioner argued that his offense did not categorically require "*violent* force" as an element, and the district court's ruling should be affirmed on that basis.

The court of appeals, however, accepted the government's arguments, vacated Petitioner's 73-month sentence, and remanded for re-sentencing with the ACCA enhancement. The court agreed with the government that the district court erred by considering the underlying facts of Petitioner's robbery offense; instead, it "should have applied the 'categorical approach,' which looks only to the elements of the crime." J.A. 30 (citation and brackets omitted). Applying that approach, the court held it was bound by circuit precedent, including the post-briefing decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), which held that *Lockley* and *Dowd* remained binding, and "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." J.A. 29. Based on that precedent, and still without expressly considering *Montsdoca*, *McCloud*, or any post-*Robinson* Florida case law, the court held that "[t]he force element of Florida robbery satisfies the elements clause of the [ACCA]," because it "requires 'resistance by the victim that is overcome

by the physical force of the offender.'" J.A. 31 (quoting *Robinson*, 692 So. 2d at 886).

3. Petitioner sought a writ of certiorari. While his petition was pending, a unanimous panel of the Ninth Circuit expressly put itself "at odds with the Eleventh Circuit" by holding that Florida robbery is *not* a "violent felony" under the ACCA's elements clause. *United States v. Geozos*, 870 F.3d 890, 898-901 (9th Cir. 2017). From its review of Florida appellate case law, the Ninth Circuit found it "clear that one can violate section 812.13 without using violent force." *Id.* at 900. While acknowledging that "'there must be resistance by the victim that is overcome by the physical force of the offender,'" *id.* (quoting *Robinson*, 692 So. 2d at 886), the Ninth Circuit thought it "[c]rucial[ ]" that "the amount of resistance can be minimal," *id.* (citing *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977) for the proposition that the victim may resist "*in any degree*"). In finding *Fritts* unpersuasive, the Ninth Circuit observed "that the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, ha[d] overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159).

This Court granted certiorari. 584 U.S. ___, 138 S. Ct. 1438 (2018) (mem.).

SUMMARY OF ARGUMENT

Florida robbery is not a "violent felony" under the ACCA's elements clause.

The "categorical approach" governs the analysis. Under that familiar methodology, the Court considers only the elements of the offense, *Descamps v. United States*, 570 U.S. 254, 261 (2013), and must therefore assume the offense was committed in the least culpable manner criminalized by state law, *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010). If that least culpable conduct does not satisfy the elements clause, the offense is categorically overbroad and does not qualify as a "violent felony." Here, Florida robbery is categorically overbroad vis-à-vis the elements clause because it does not have "as an element" the use of "physical force." 18 U.S.C. § 924(e)(2)(B)(i). That conclusion is compelled by a straightforward application of the categorical approach, this Court's definition of "physical force" as "*violent* force," *Curtis Johnson*, 559 U.S. at 140, and an examination of substantive Florida law.

A. In *Curtis Johnson*, the Court defined "physical force" in the ACCA to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* (emphasis in original). The extensive explanation surrounding that definition makes clear that "*violent* force" requires a "substantial degree of force." *Id.* That means "an unusual degree of strength or energy," or an "extreme" degree of force that is "furious," "severe," "vehement," and "strong." *Id.* at 139-40

(citation and alterations omitted). In short, a heightened degree of force or power is required.

Focusing instead on a single word in the Court's definition, the government has suggested that "*violent* force" is any force potentially "capable" of causing pain or injury even in an outlier case. *See* Gov't Br. in Opposition ("BIO") 9, 11-12. But that all-inclusive view is incompatible with both the reasoning and result in *Curtis Johnson*. Indeed, *all* force is potentially capable of causing pain or injury in some situations, including the shoulder tap that *Curtis Johnson* deemed non-violent. The government's limitless view ignores the Court's repeated focus on "a substantial degree of force," and eliminates the distinction *Curtis Johnson* sought to draw between violent and non-violent force. When read alongside the extensive explanation surrounding it, the Court's "*violent* force" definition requires a degree of force reasonably expected to cause pain or injury. That contextual reading comports with "*violent* force" as a "substantial degree of force." And it also explains why *Curtis Johnson* indicated a slap in the face might involve "*violent* force," 559 U.S. at 143, but held a shoulder tap does not, *id.* at 137-39, 145.

The Court confirmed the correctness of that reading of *Curtis Johnson* in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405 (2014). There, the Court reiterated that "*violent* force" "'connotes a substantial degree of force.'" *Id.* at 1410-11 (quoting *Curtis Johnson*, 559 U.S. at 140). And the Court indicated that "[m]inor uses of force," including "a squeeze of the arm that causes a bruise," would not satisfy *Curtis*

Johnson's definition. *Id.* at 1411-12 (quotation and brackets omitted).

B. Florida robbery lacks "*violent* force" as an element because it can be committed by using only a slight degree of force. Florida Supreme Court cases going back nearly a century establish that, to commit the offense of robbery, "[t]he degree of force is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). The only qualification is that the force must "overcome the victim's resistance." *Montsdoca*, 93 So. at 159; *see Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997). But that qualification does not require a substantial degree of force in every case, because Florida law "does not require that the victim of robbery resist to any particular extent." Fla. Std. Jury Instr. (Crim.) 15.1. Because the victim's resistance can be slight, only a slight degree of force is necessary to overcome it.

In holding that Florida robbery satisfies the ACCA's elements clause, the Eleventh Circuit failed to meaningfully scrutinize Florida law and therefore overlooked that proportional relationship. Several Florida cases illustrate that precise dynamic at work. For instance, robbery can be committed in Florida where a pickpocket caught in the act simply seeks to pull free from the victim's grasp. And it can also be committed where a person does no more than grab cash from someone's closed fist, tearing the bill but not touching the person. If the victim grips the cash (or the escaping pickpocket) loosely, or releases his grip after

only a moment of resistance, the slightest degree of force will transform a garden-variety petty theft into robbery. *See infra* Part B(3) (discussing Florida cases).

These Florida robbery examples do not involve the extreme, powerful, severe, strong, or vigorous force that *Curtis Johnson* requires. Rather than involving "a substantial degree of force," they require even less force than one of the "minor" uses of force *Castleman* said would not constitute "*violent* force": the bruising squeeze of the arm. The government acknowledged in its brief in opposition here that other courts of appeals had correctly held that shoving, bumping, and jerking a victim by the shoulder all involved non-violent force under *Curtis Johnson*. BIO 14-15. And that acknowledgement confirms that Florida robbery likewise does not require "*violent* force," since it may be committed by the same, and even less forceful, conduct. Because the shoving, bumping, and jerking at issue in the other circuit cases was potentially "capable" of causing pain or injury in an outlier case, the government's candid agreement—that the conduct in those cases did not involve "*violent* force"—further refutes its novel reading of *Curtis Johnson*.

C. The conclusion that Florida robbery is not a "violent felony" is not only compelled by this Court's precedents and substantive Florida law; it accords precisely with the "basic purposes" of the ACCA. *Begay v. United States*, 553 U.S. 137, 146 (2008). In *Begay*, the Court explained that Congress sought to mandate a severe 15-year sentence only for "a particular subset of offender[s]" who, based on their record of past crimes, are

increasingly likely to "deliberately point [a] gun and pull the trigger." *Id.* at 146-47. That increased likelihood of gun violence is absent here, because Florida robbery sweeps in conduct that is not designed to cause any harm. Indeed, the offense encompasses unsuccessful pickpockets and shoplifters who seek to avoid any physical confrontation and use force only to escape once caught. And it also encompasses those who do no more than grab cash out of someone's closed hand. Because such conduct is neither designed nor expected to cause any physical harm, it cannot plausibly serve as a predictor of gun violence. It would contravene the basic statutory purpose to mandate 15-year prison sentences based on such garden-variety, petty criminal conduct. Petitioner's sensible reading of *Curtis Johnson* avoids that incongruous result.

ARGUMENT

FLORIDA UNARMED ROBBERY IS NOT A "VIOLENT FELONY" UNDER THE ELEMENTS CLAUSE OF THE ARMED CAREER CRIMINAL ACT

The ACCA specifies a harsh mandatory minimum sentence for a broad array of individuals prohibited from possessing a firearm, including convicted felons, 18 U.S.C. § 922(g), who also have three prior "violent felon[ies]" or "serious drug offense[s]," 18 U.S.C. § 924(e). For those with such a criminal history, the ACCA transforms the otherwise-applicable 10-year statutory maximum penalty into a 15-year mandatory minimum

penalty and a maximum penalty of life. 18 U.S.C. §§ 924(a)(2), 924(e). In mandating this "stringent" penalty, Congress' "basic purpose[ ]" was to target "only a particular subset of offender"—namely, those whose criminal history demonstrates "an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 139, 146-47 (2008).

The ACCA defines a "violent felony" as an offense that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The definitions in subsection (ii) are not at issue here. In *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared void for vagueness the latter half of subsection (ii), known as the "residual clause." And robbery is not one of the offenses enumerated in the first half of that subsection. Without subsection (ii), Florida robbery may qualify as a "violent felony" only under subsection (i), known as the "elements clause." *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1261 (2016).

To determine whether Florida robbery satisfies the elements clause, the Court employs the "categorical approach," under which it "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps v. United States*, 570

U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). If the statutory elements are the same as, or narrower than, the federal definition, the offense qualifies as a "violent felony." "But if the statute sweeps more broadly than" the federal definition, the offense "cannot count as an ACCA predicate, even if the defendant actually committed the offense" in a qualifying manner. *Descamps*, 570 U.S. at 261.

Due to this unwavering focus on the statutory elements of the offense, as opposed to the actual facts, the Court must "examine what the state conviction necessarily involved." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). To make that determination, the Court "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Id.* at 190-91 (quoting *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010) (brackets omitted)). And to determine the least culpable conduct for a state conviction, the Court must look to state law, since it is "fundamental to our system of federalism" that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered" by the state courts. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Thus, while the "meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law," federal courts are "bound" by state courts' "interpretation of state law, including [their] determination of the elements" of the offense. *Curtis Johnson*, 559 U.S. at 138.

Of course, the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability . . . that the State would apply its statute to conduct that falls outside'" the federal definition. *Moncrieffe*, 569 U.S. at 191 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). But to show such a probability, an offender need only point to a case "in which the state courts in fact did apply the statute" in an overbroad manner. *Duenas-Alvarez*, 549 U.S. at 193. Petitioner can easily make that showing here because, as explained below, several cases illustrate that Florida robbery can be committed without the type of "physical force" required by 18 U.S.C. § 924(e)(2)(B)(i). Florida robbery is therefore categorically overbroad vis-à-vis the ACCA's elements clause, and cannot qualify as a "violent felony."

A. In the ACCA, "Physical Force" Means "*Violent* Force"

In *Curtis Johnson*, the Court interpreted "physical force" in the ACCA to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). The extensive explanation surrounding that definition, as well the Court's subsequent discussion in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405, 1411-12 (2014), establishes that "*violent* force" requires a "substantial degree of force." *Curtis Johnson*, 559 U.S. at 140.

1. "*Violent* Force" Requires a "Substantial Degree of Force"

The Court in *Curtis Johnson* began by identifying the "ordinary meaning" of "physical force." 559 U.S. at 138. Citing both lay and legal dictionaries, the Court explained that the "general usage" of the term "force" "means strength or energy; active power; vigor; often an unusual degree of strength or energy; power to affect strongly in physical relations"; and "power" or "violence." *Id.* at 138-39 (quoting Webster's New International Dictionary 985 (2d ed. 1954), and Black's Law Dictionary 717 (9th ed. 2009) (brackets and quotation marks omitted)). Synthesizing the commonalities of these definitions, the Court observed that they all "suggest a degree of power that would not be satisfied by the merest touching." *Id.* at 139. Thus, the "ordinary meaning" of "force" in both common parlance and the law requires a heightened degree of power.

Given the context in which "physical force" is used in the ACCA, the Court adopted the ordinary meaning of "force." In doing so, the Court rejected the broader common law meaning of "force" proposed by the government, which would have encompassed "[t]he most nominal contact," such as a mere offensive touching. *Id.* at 138-40 (quotation omitted). The common law definition derived from common law *misdemeanor* battery; thus, the Court found, it was "a comical misfit with the defined term 'violent felony.'" *Id.* at 141-42, 145. By contrast, the "more general usage" of "force" fit well in the ACCA context. *Id.* at 139-40. The Court emphasized that it was "interpreting the phrase 'physical

force' as used in defining . . . the statutory category of 'violent felonies.'" *Id.* (citation and brackets omitted). In that regard, the Court relied on *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where it had interpreted a "very similar" definition in 18 U.S.C. § 16(a), and stated, "'[W]e cannot forget that we ultimately are determining the meaning of the term crime of violence. The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes.'" *Curtis Johnson*, 559 U.S. at 140 (quoting *Leocal*, 543 U.S. at 11) (quotation marks omitted).

Emphasizing that "[u]ltimately, context determines meaning," *id.* at 139, the Court in *Curtis Johnson* found it "clear" that, in the "violent felony" context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person," *id.* at 140. Immediately after articulating that definition, the Court confirmed that "*violent* force" is determined by the degree of force, explaining: "Even by itself, the word 'violent' . . . connotes a substantial degree of force." *Id.* As support, the Court again relied on several dictionaries, which defined "violent" as: "physical force, esp[ecially] by extreme and sudden or by unjust or improper force; furious; severe; vehement"; "the exertion of great physical force or strength"; and "strong physical force." *Id.* (quoting Webster's Second, *supra*, at 2846; 19 Oxford English Dictionary 656 (2d ed. 1989); and Black's Law Dictionary, *supra*, at 1706). The Court added: "When the adjective 'violent' is attached to the noun 'felony,'

its connotation of strong physical force is even clearer." *Id.*

Thus, both before and immediately after adopting its "*violent* force" definition, the Court confirmed that "*violent* force" involves a heightened degree of force. The Court even reiterated that understanding a final time, stating: "As we have discussed . . . the term 'physical force' itself normally connotes force strong enough to constitute 'power'—and all the more so when it is contained in a definition of 'violent felony.'" *Id.* at 142. Over the course of its analysis, the Court used the word "degree" four separate times. *See id.* at 139-43.

Ultimately, the Court gave concrete meaning to its "*violent* force" definition by applying it to the least culpable conduct in the case before it. The offense at issue in *Curtis Johnson* was Florida simple battery. Florida courts had construed that offense consistent with the common law, such that a battery could be committed "by *any* intentional physical contact, no matter how slight . . . such as a tap on the shoulder without consent." *Id.* at 138 (quotation marks, citations, and brackets omitted). Focusing exclusively on that nominal degree of force, the Court easily concluded that Florida simple battery, when committed by an offensive touching, did not satisfy its "*violent* force" definition. *See id.* at 139-43, 145.

2. The Government's "Capable" Test Disregards that "*Violent* Force" Requires a "Substantial Degree of Force"

The government seeks a dramatic expansion of *Curtis Johnson*. In its brief in opposition, it suggested that any conduct potentially "capable" of causing pain or injury is violent force. *See* BIO 9, 11-12. But that interpretation is not faithful to the Court's opinion. It ignores the extensive discussion surrounding *Curtis Johnson*'s "*violent* force" definition, including the Court's characterization of "*violent* force" as "a substantial degree of force." 559 U.S. at 140. Instead, the government improperly reads a single word in that definition ("capable") in isolation, without regard for the explanation elucidating it. This Court has cautioned that, when reading its decisions, statements must not be read "in isolation"; rather, they "must be evaluated alongside" the surrounding explanation. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017). The government fails to heed that warning.

Not only does the government's interpretation render most of *Curtis Johnson* superfluous; it also lacks a limiting principle. After all, *any* degree of force is potentially "capable" of causing pain or injury under certain circumstances. Indeed, even the most nominal contact, such as a tap on the shoulder, is capable of doing so where, for instance, the person tapped just had shoulder surgery, or where the tap startles someone at the top of a staircase, causing him to fall and suffer injury. Yet *Curtis Johnson* held the degree of force used

in a shoulder tap is *not* "*violent* force." Thus, the government's all-encompassing reading of *Curtis Johnson* cannot be reconciled with the result reached in that very case. And it would eviscerate the fundamental distinction the Court sought to draw between violent and non-violent force, sweeping in every offense requiring physical contact.

To avoid that absurd result, the Court need only read the word "capable" in context. When read in conjunction with the entire opinion, "*violent* force" cannot mean any force potentially capable of causing pain or injury in an outlier case, as the government proposes. Instead, it must mean a degree of force reasonably expected to cause pain or injury. That understanding comports with the Court's repeated characterization of "*violent* force" as a substantial or heightened degree of force. It is therefore the only way to reconcile the Court's "*violent* force" definition with the extensive discussion surrounding and explaining it.

That contextual and sensible reading of *Curtis Johnson*'s "*violent* force" definition is bolstered by the Court's rejection of one of the government's arguments in that case. Specifically, the government pointed out that 18 U.S.C. § 922(g)(8)(C)(ii) prohibits the possession of a firearm by anyone subject to a protective order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." The government argued that, because the ACCA's elements

clause does not include the "reasonably . . . expected to cause bodily injury" language, the Court should decline to import such a qualifier into the ACCA. *Curtis Johnson*, 559 U.S. at 143.

The Court squarely rejected that argument, both as a matter of statutory interpretation and as a matter of logic. *Id.* The Court refused to infer the deliberate omission of a similar qualifier in § 924(e)(2)(B)(i), because § 922(g)(8) was enacted eight years after the ACCA. *Id.* And, the Court added, even if Congress did not intend to limit the ACCA to force reasonably expected to cause bodily injury, it still would not logically follow that " 'physical force' would consist of the merest touch. It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example." *Id.* By refusing to infer the deliberate omission of a "reasonable expectation of injury" qualifier—and by acknowledging that a substantial degree of force reasonably expected to cause pain might qualify as "*violent* force"—the Court confirmed that "a substantial degree of force" is that reasonably expected to cause pain or injury.

Measuring the requisite degree of force in that way explains why a slap in the face might involve "*violent* force," but a shoulder tap does not. That measurement is also consistent with the lone citation the Court appended to its "*violent* force" definition. *Id.* at 140 ("the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person. See *Flores v. Ashcroft*, 350 F.3d 666, 672 (C.A.7 2003) (Easterbrook, J.)."). On the pin-cited

page of *Flores*, the Seventh Circuit explained that, to "avoid collapsing the distinction between violent and non-violent offenses," "the force [must] be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." 350 F.3d at 672. Thus, "[a]n offensive touching is on the 'contact' side of this line, a punch on the 'force' side." *Id.* By endorsing that dividing line, the Court in *Curtis Johnson* sought to create a clear distinction between violent and non-violent offenses.

3. A "Minor" Use of Force Is Not "*Violent* Force"

The Court confirmed the correctness of Petitioner's reading of *Curtis Johnson* in *Castleman*. There, the Court interpreted the elements clause in 18 U.S.C. § 921(a)(33)(A)(ii), defining "misdemeanor crime of violence" for purposes of 18 U.S.C. § 922(g)(9) (prohibiting firearm possession by those with such misdemeanors) as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon by a current or former spouse, parent, guardian [and like individuals]." Because of contextual differences between that statute and the ACCA's elements clause, the Court held *Curtis Johnson*'s "*violent* force" definition did not apply in the "misdemeanor crime of domestic violence" context; instead, the Court gave "physical force" its broader common law meaning. *Castleman*, 134 S. Ct. at 1410-13.

In the process, however, the Court reaffirmed *Curtis Johnson*'s stricter "*violent* force" definition for the ACCA. *Id.* at 1410-11 & n.4. And, in doing so, the Court reiterated that "*violent* force" "'connotes a substantial degree of force.'" *Id.* at 1410-11 (quoting *Curtis Johnson*, 559 U.S. at 140). *Castleman* also expressly recognized that "[m]inor uses of force may not constitute 'violence' in the generic sense" employed in *Curtis Johnson*. *Id.* at 1412. "For example," the Court explained, "in an opinion that we cited with approval in [*Curtis*] *Johnson*, the Seventh Circuit noted that it was 'hard to describe as violence a squeeze of the arm that causes a bruise.'" *Id.* (quoting *Flores*, 350 F.3d at 670) (brackets, quotation marks, and alterations omitted). As explained below, Florida robbery can be committed with far less force than that.

B. Florida Robbery Lacks "*Violent* Force" as an Element Because the Offense Requires Only a Slight Degree of Force

"At common law . . . , robbery was an aggravated form of larceny. Specifically, the common law defined larceny as 'the felonious taking, and carrying away, of the personal goods of another.'" *Carter v. United States*, 530 U.S. 255, 278 (2000) (Ginsburg, J., dissenting) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 230 (1769)). "Unlike larceny, however, robbery included one further essential component: an element of force, violence, or intimidation." *Id.* at 279. Florida codified the crime of robbery in 1868, and the Florida Supreme Court has interpreted that core

component of the offense in accordance with the common law ever since. *See Pippin v. State*, 136 So. 883, 884 (Fla. 1931); *Montsdoca v. State*, 93 So. 157, 158-59 (Fla. 1922); *Simmons v. State*, 25 So. 881, 882 (Fla. 1899).

In 1987, however, Florida diverged from the common law in one significant respect: *when* the force, violence, or putting in fear must occur. Until that time, "Florida followed the common law rule for robbery, which required that the 'force, violence, assault, or putting in fear must occur prior to or contemporaneous with the taking of property.'" *Rockmore v. State*, 140 So. 3d 979, 982 (Fla. 2014) (quoting *Royal v. State*, 490 So. 2d 44, 45 (Fla. 1986) (quotation marks omitted)). Under the pre-1987 common law rule in Florida, "if violence was not used to take property, but was used to flee with stolen property, there could be no robbery." *Id.*; *see Royal*, 490 So. 2d at 45-46 (holding that fleeing shoplifters who used force to escape did not commit robbery). In response to the Florida Supreme Court's decision in *Royal*, however, the Florida "Legislature amended the robbery statute to prevent this result by expanding robbery to include force occurring in an attempt to take money or property, or in flight after the attempt or taking." *Rockmore*, 140 So. 3d at 982 (quotation and brackets omitted); *see* Fla. Stat. § 812.13(3)(b) (1987) (expanding definition of "in the course of the taking"); *Robinson v. State*, 692 So. 2d 883, 886 n.9 (Fla. 1997) (discussing 1987 amendment).

Despite the 1987 legislative expansion, Florida has continued to retain the core common law element

requiring "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13(1), including at the time of Petitioner's 1997 conviction.[1] As the government conceded in the court of appeals, those statutory alternatives are different means by which this indivisible element of Florida's robbery offense may be satisfied. Gov't C.A. Reply Br. 1. Thus, under the categorical approach, if any one of those means of commission sweeps more broadly than the ACCA's elements clause, the offense is categorically overbroad. Florida robbery when committed by the "use of force" is categorically overbroad because, as explained below, it may be committed by only a slight degree of force.

1. Florida Robbery Can Be Committed by *Any* Degree of Force, Provided it Overcomes Resistance

In *Curtis Johnson*, the Court deferred to the Florida Supreme Court's holding that, consistent with the common law Florida battery could be committed "by *any* intentional physical contact." 559 U.S. at 138-39 (citing *State v. Hearns*, 961 So. 2d 211, 218 (Fla. 2007)). Similarly here, the Florida Supreme Court has repeatedly embraced the common law rule that

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[1] The current version of the Florida robbery statute, which was in effect at the time of Petitioner's conviction, defines "[r]obbery" as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1992).

robbery can be committed by *any* degree of force. *See* 4 *Wharton's Criminal Law* § 460 (15th ed. 2017) ("The degree of force used is not material."); Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84, 87 (1954) ("[T]he degree of violence is immaterial at common law.").

In *Montsdoca v. State*, 93 So. 157 (Fla. 1922), the Florida Supreme Court explained that, in accordance with the common law, the use of force distinguished robbery from larceny; there can be no robbery without force and no larceny with it. *Id.* at 158-59. But the court cautioned that "[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance." *Id.* at 159. As long as some resistance is overcome, "[t]he degree of force used is *immaterial*." *Id.* (emphasis added); *accord Martin v. State*, 129 So. 112, 114 (Fla. 1930).

In *McCloud v. State*, 335 So. 2d 257 (Fla. 1976), the Florida Supreme Court, after citing *Montsdoca*, reaffirmed that the degree of force used is immaterial, by stating: "*Any degree of force* suffices to convert larceny into a robbery." *Id.* at 258 (emphasis added). Only "[w]here no force is exerted upon the victim's person, as in the case of a pickpocket," does a larceny rather than a robbery occur. *Id.* at 259; *accord Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985) ("As we stated in *McCloud*, any degree of force suffices to convert larceny into a robbery.") (citation and brackets omitted). Applying *McCloud*, Florida courts recognized that the degree of force necessary to overcome resistance could

be "ever so little." *Santiago v. State*, 497 So. 2d 975, 976 (Fla. Dist. Ct. App. 1986).

In *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), the Florida Supreme Court clarified whether purse snatching constituted theft or robbery. *Id.* at 884. The court held that the answer depended on whether the victim resisted: if so, and the offender overcame that resistance, it was robbery; if not, it was theft. *See id.* at 885-87. As to the elements of robbery, the court favorably cited *Montsdoca*, summarized *McCloud*, and then stated: "In accord with our decision in *McCloud*, we find that in order for the snatching of property from another to amount to robbery . . . there must be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886.[2]

By reaffirming *Monstdoca* and *McCloud*, and by recognizing that even some purse snatchings could constitute robbery so long as there was victim resistance, the Florida Supreme Court reiterated the longstanding rule in Florida that "[t]he degree of force used is immaterial," *Montsdoca*, 93 So. at 158, such that "[a]ny degree of force" will suffice, *McCloud*, 335 So. 2d at 258. The only qualification is that the force must overcome resistance. But, as explained below,

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[2] In response to the other half of *Robinson*'s holding—*i.e.*, that snatching constituted theft where there was no resistance—the Florida Legislature created a new, lesser form of robbery known as "[r]obbery by sudden snatching." Fla. Stat. § 812.131 (1999). That distinct form of robbery is not at issue here.

overcoming resistance does not categorically require a substantial degree of force in every case.

2. Physical Resistance by the Victim May Be Slight

The reason any degree of force, no matter how slight, may suffice to overcome resistance is that a victim's resistance itself may be slight. The standard jury instructions in Florida make that proposition explicit: "The taking must be by the use of force," but "[t]he law does not require that the victim of robbery resist to any particular extent"; there just needs to be "some resistance to make the taking one done by force." Fla. Std. Jury Instr. (Crim.) 15.1 (2018).[3] Consistent with that instruction, Florida appellate courts have uniformly recognized that a robbery victim may "resist[ ] in any degree." *S.W. v. State*, 513 So. 2d 1088, 1091 (Fla. Dist. Ct. App. 1987) (quoting *Adams v. State*, 295 So. 2d 114, 116 (Fla. Dist. Ct. App. 1974) and *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977)); *see Robinson*, 692 So. 2d at 886 (citing *S.W.*, *Adams*, and *Mims* with approval).

That aspect of Florida law gives rise to a key dynamic: where the victim's physical resistance is slight, so too will be the degree of force necessary to overcome

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[3] That instruction has long been in effect, including at the time of Petitioner's conviction. *See Standard Jury Instructions in Criminal Cases (97-1)*, 697 So. 2d 84, 94 (Fla. 1997); *Standard Jury Instructions in Criminal Cases (95-2)*, 665 So. 2d 212, 217 (Fla. 1995); *In re Standard Jury Instructions in Criminal Cases*, 543 So. 2d 1205 (Fla. 1989) (Exh. 6).

it. *See United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (recognizing that under Florida law, "if the resistance itself is minimal, then the force used to overcome that resistance" may be too); *United States v. Lee*, 886 F.3d 1161, 1169 (11th Cir. 2018) (Jordan, J., concurring) ("[G]iven minimal resistance, Florida robbery can be committed with minimal force"). As a matter of proportionality, where the victim's resistance is ever-so slight, fleeting, or reflexive, overcoming such resistance will not require a prolonged, intense struggle where the offender physically overpowers the victim. It will require only slight force.

The Ninth Circuit correctly observed that, in holding that Florida robbery satisfies the elements clause, "the Eleventh Circuit . . . overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Geozos*, 870 F.3d at 901. Indeed, the Eleventh Circuit inexplicably assumed that "*violent* force" is always or inherently necessary to overcome resistance. And it made that assumption without carefully examining Florida law to determine the least culpable conduct for conviction. *See United States v. Fritts*, 841 F.3d 937, 939-44 (11th Cir. 2016) (reaffirming precedential status of prior decisions that had failed to analyze Florida law; analyzing Florida law *only* to reject the distinct argument that, before *Robinson*, a "mere snatching" without resistance constituted robbery). Had the Eleventh Circuit scrutinized Florida law to determine the least culpable conduct, as this Court's precedents dictate, it would have found ample

confirmation for what the Florida Supreme Court has explicitly held: robbery can be committed with "[a]ny degree of force." *McCloud*, 335 So. 2d at 258.

3. Florida Robbery May Be Committed by Only the Slight Degree of Force Necessary to Overcome Slight Resistance

In accordance with the principles announced by the Florida Supreme Court, several cases vividly reflect the sweeping breadth of Florida's robbery statute. It can be violated by even the slightest use of force, and such force does not amount to "*violent* force" under *Curtis Johnson*.

a. The Florida Supreme Court itself addressed one such scenario in *Colby v. State*, 35 So. 189 (Fla. 1903). In that case, the victim "caught the arm or hand" of a pickpocket on a crowded street "and held it" as he called out to his friend and the police for assistance. *Id.* at 190. The defendant and the victim became "clinched," and the defendant sought "to escape from the grasp" of the victim to avoid arrest. *Id.* Because Florida at that time was still following the common law rule requiring the force to occur before or during the taking, the conduct in *Colby* was deemed a larceny, as "the force [was] used merely in an effort to escape." *Id.* However, the Florida Supreme Court later explained in *Robinson* that, following the 1987 amendment to Fla. Stat. § 812.13, "the crime in *Colby* . . . would be robbery under the current version of the statute because the perpetrator used force to escape the victim's grasp." 692 So. 2d at 887 n.10.

Thus, at the time of Petitioner's conviction, the degree of force used simply to pull one's arm or hand free from another's grasp could elevate a garden-variety pickpocketing to a robbery. But that degree of force is not "substantial." It is certainly not reasonably expected to cause pain or injury; rather, it is used only to get away after being unexpectedly caught in the act. And only the slightest degree of force will be needed to pull away when the victim's grasp is tenuous, or when the victim releases after only a moment. The escaping offender will overcome resistance by the slightest pull. That force is quintessentially non-violent.

b. Florida robbery can also be committed by grabbing money from someone's closed fist, without even touching the person. For example, in *State v. Dawkins*, the defendant "confronted the victim about . . . rent money at which time the victim attempted to hand[ ] him some money." Complaint/Arrest Affidavit, Case No. 17003199 (Fla. Cir. Ct. Feb. 17, 2017); App. 7a-8a. But "as [the defendant] grabbed a hold of the money," "the victim pulled back as she held on to the money, not letting go." *Id.* At that point, the defendant "grabbed a hold of the money as one bill ripped during the altercation." *Id.* Although the defendant used no additional force, he was charged with, and convicted of, robbery under Fla. Stat. § 812.13. Judgment, Case No. 17003199 (Fla. Cir. Ct. June 29, 2017); App. 9a-17a.

The degree of force used in *Dawkins* was not "a substantial degree of force." Indeed, the offender did not even touch the victim; he merely grabbed money held in the victim's outstretched hand. And the victim's

resistance consisted simply of withdrawing her initial offer, retracting her hand, and holding on to the money. As reasonably expected, no physical pain or injury resulted. In no sense can that slight degree of force be considered "severe," "extreme," "furious," "vehement," "strong," or "power[ful]." *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted).

c. Even when the defendant does touch the victim's hand during a cash grab, the degree of force necessary to overcome resistance may still be slight where the resistance itself is slight. In *Sanders v. State*, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the appellate court addressed "whether the state presented sufficient evidence of a robbery" by force where the defendant approached the victim, asked him for change to make a phone call, and, as the victim reached into his pocket, "reached over and grabbed" cash out of the victim's other hand. *Id.* at 506. Citing *Robinson*, the court held that this was indeed robbery, because the defendant "had to peel [the victim's] fingers back in order to get the money." *Id.* at 507. Although the victim was not injured, the "clutching of his bills in his fist" was "as an act of resistance against being robbed." *Id.* And, the court emphasized, "[t]he fact that [the victim] did not put up greater resistance [did] not transform [the] act into a simple theft or, under the new statute, a robbery by snatching." *Id.* *See also Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1993) (upholding conviction for robbery by force where the defendant approached the victim, "reached across her shoulder, 'raked' her hand and grabbed the money").

Neither the conduct in *Sanders* nor that in *Winston Johnson* involved "a substantial degree of force." The defendant in *Sanders* did no more than open the victim's hand and grab money, doing both "at the same time" and using "the same hand." 769 So. 2d at 507. And the victim did no more than momentarily "clutch" the bills, without "put[ting] up greater resistance." *Id.* Thus, only slight force was needed to loosen that weak grip. As would be reasonably expected, no pain or injury resulted. In *Winston Johnson*, similar (if not less forceful) conduct—merely "rak[ing]" the victim's hand—unexpectedly caused "slight injury" only because the victim happened to have a scab on her finger. 612 So. 2d at 690-91. The slight degree of force used in those cases was not "severe," "extreme," "furious," "vehement," "strong," or "power[ful]." *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted). It thus fell short of the "substantial degree of force" necessary to constitute "*violent* force."

* * *

As the Ninth Circuit panel unanimously concluded, "Florida caselaw makes it clear that one can violate section 812.13 without using violent force." *Geozos*, 870 F.3d at 900. The above cases demonstrate that robbery may be committed without a substantial degree of force. Rather than involving an "unusual degree of strength or energy," or an "extreme," "furious," "severe," "vehement," or "strong" use of force or "power," *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted), they involved precisely the sort of "minor" uses of force *Castleman* characterized as non-violent. In fact,

each example above involved far less force than the bruising arm-squeeze that *Castleman* doubted would rise to the level of "*violent* force." 134 S. Ct. at 1411-12. Because Florida robbery can be committed without "*violent* force," it is categorically overbroad and thus not a "violent felony" under the elements clause.

4. The Government Acknowledges That Conduct Materially Indistinguishable From, and Even Less Forceful Than, Conduct Criminalized in Florida Does Not Involve "*Violent* Force"

In its brief in opposition, the government acknowledged that three court of appeals' opinions had correctly concluded that other state robbery offenses were not "violent felon[ies]," because "the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause." BIO 14-15 (discussing *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); and *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016)). That acknowledgment bolsters Petitioner's argument here because the least culpable conduct considered in those cases is materially indistinguishable from, and in some cases more forceful than, the conduct criminalized as robbery in Florida. And because the conduct discussed in all of the other circuit cases was at least potentially "capable" of causing pain or injury, the government's acknowledgement refutes its own reading of *Curtis Johnson*'s "*violent* force" definition.

a. In *Gardner*, the Fourth Circuit addressed North Carolina common law robbery, for which (like Florida robbery) the state's highest court had confirmed "the degree of force used is immaterial." 823 F.3d at 803 (quotation omitted). The Fourth Circuit concluded that this offense was not a "violent felony" because a state appellate court had upheld a robbery "conviction when a defendant pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television." *Id.* at 803-04.

The government agrees with the Fourth Circuit that such conduct does not satisfy *Curtis Johnson*. *See* BIO at 14-15. But that admittedly non-violent conduct is materially indistinguishable from the conduct deemed sufficient for a Florida robbery conviction in *Rumph v. State*, 544 So. 2d 1150 (Fla. Dist. Ct. App. 1989). In *Rumph*, a shoplifter caught leaving a store "push[ed] [an employee] out of the way as he bolted through the front door. As [the employee] was shoved out of the way, she hit her shoulder on the door," but sustained no reported injury. *Id.* at 1151. In light of the 1987 legislative amendment to Fla. Stat. § 812.13, the appellate court concluded that the offender's slight use of force during flight—following a completely non-violent, stealth taking where he had no contact with another person—was sufficient to transform an otherwise petty theft into robbery. *Id.* at 1151-52.

No meaningful distinction can be drawn between the shove considered in *Gardner* and the shove in *Rumph*. If anything, the escape-facilitating shove in

Rumph, which resulted in no reported injury, was *less* forceful than the theft-facilitating shove *Gardner* deemed non-violent. Surely the latter conduct, which the government agrees is not violent, was more forceful than the conduct in *Colby*, where the offender merely sought to escape from the victim's grasp. And it is likewise more forceful than the conduct in *Dawkins*, where the offender simply grabbed cash without even touching the victim.

b. In *Winston*, the Fourth Circuit similarly concluded that Virginia common law robbery did not categorically require "*violent* force" based on a case upholding a conviction where the defendant "approached the victim from behind, tapped her on the shoulder, . . . jerked her around by pulling her shoulder, took her purse, and ran," even though the "victim's resistance in that case was limited to the fact that she was forced to turn and face the defendant." 850 F.3d at 685 (quotations omitted). And, in *Yates*, the Sixth Circuit found Ohio statutory robbery did not categorically require "*violent* force" based on a case upholding a conviction where the victim "had a firm grasp of her purse, with the strap over her shoulder, when the defendant pulled it from her and then pulled her right hand off of her left hand . . . where she was holding the bottom part of her purse." 866 F.3d at 729 (quotation and brackets omitted).

The government agrees the purse-tugging conduct considered in *Winston* and *Yates* is non-violent. *See* BIO at 14-15. But such conduct was comparable to that deemed sufficient for the robbery conviction in

Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011). In *Benitez-Saldana*, the Florida appellate court held that "a conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." *Id.* at 323 (citing *McCloud* for the proposition that "any degree of force suffices") (brackets omitted). The offender considered in *Winston* went beyond the mere tug-of-war in *Benitez-Saldana* by "jerking" the victim around before grabbing her purse, 850 F.3d at 685, and the offender considered in *Yates* pulled the victim's hand off a purse that she "firm[ly] grasp[ed]," 866 F.3d at 729. Yet the government agrees that such conduct does not satisfy *Curtis Johnson*.

c. In *Yates*, the Sixth Circuit also relied on an Ohio robbery conviction committed by "bumping an elderly victim in order to distract her attention while another person removed her wallet from her purse." 866 F.3d at 729 (quotation omitted). In this scenario also, the government agrees that the force involved was not "*violent* force." *See* BIO at 14-15. But the bump that compelled the ruling in *Yates* was no less forceful than the conduct deemed sufficient for a robbery conviction in *Hayes v. State*, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001), where the defendant merely "'bumped' [the victim] from behind with his shoulder." *Id.* at 919. While the victim surmised that the bump "probably would have caused her to fall to the ground but for the fact that she was in between rows of cars," she did not fall, let alone suffer pain or injury. *Id.* There is no basis to find the harmless bump in *Hayes* more forceful than the harmless bump considered in *Yates*.

* * *

In short, the conduct sufficient for a robbery conviction in Florida is materially indistinguishable from, and in fact less forceful than, the conduct addressed in *Gardner*, *Winston*, and *Yates*. Because the government has acknowledged that the degree of force considered in those cases was correctly deemed non-violent, the same must be true of the conduct criminalized as robbery in Florida. And because the non-violent conduct highlighted in *Gardner*, *Winston*, and *Yates* was all potentially "capable" of causing pain or injury (even if it did not actually cause pain or injury), the government's reading of *Curtis Johnson* cannot be correct. Instead, the Court should apply the straightforward test *Curtis Johnson* announced: if the conduct requires a "substantial degree of force," then it is "*violent* force"; if not, then not. The least culpable conduct necessary to commit robbery in Florida falls squarely on the non-violent side of that line.

C. Treating Florida Robbery as an ACCA "Violent Felony" Would Conflict with Congress' Purpose of Targeting Only Those Offenders Likely to Commit Gun Violence

Characterizing slight force as "*violent* force" would contravene not only *Curtis Johnson* (and *Castleman*), but the ACCA's "basic purpose[]." *Begay v. United States*, 553 U.S. 137, 146 (2008). "As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Id.* "In order to determine which offenders fall into this category, the Act looks to past

crimes . . . because an offender's criminal history is relevant to the . . . kind or degree of danger the offender would pose were he to possess a gun." *Id.* "[A] prior crime's relevance to the possibility of future danger with a gun" will not exist where it exhibits a mere "callousness toward risk," but rather—and only—where it reflects "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* As this Court recognized in *Begay*: "We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist." *Id.*

That increased likelihood is absent here, because Florida robbery may be committed by conduct that is neither designed nor expected to cause any physical harm. As explained above, Florida robbery encompasses the unsuccessful pickpocket who uses force only to escape from his victim's grasp, and the unsuccessful shoplifter who uses force only to flee the scene. When a thief uses force only to escape after a non-violent crime, there is no basis to predict a deliberate willingness to physically harm someone in the future, let alone shoot someone. If anything, the pickpocket and the shoplifter are acutely averse—not predisposed—to violence. Indeed, the shoplifter need not even go near another person. And both types of petty criminals go out of their way to *avoid* a physical confrontation; the very success of their endeavors depends on it. Instead, their use of force is largely reflexive and reactive, coming only after they are unexpectedly caught in non-violent criminal acts. Such conduct

cannot plausibly predict an increased likelihood of future gun violence.

The same is true for grabbing cash out of someone's hand. The offender uses slight force for the sole purpose of obtaining the property, not causing any physical harm. To be sure, that conduct reflects some "callousness toward risk." But that is not enough to subject someone to the ACCA's severe penalties, because that conduct is so "far removed" from the "kind of behavior associated with violent criminal use of firearms" that it lacks any predictive value as to gun violence. *Begay*, 553 U.S. at 146-47. In that regard, Petitioner's understanding of *Curtis Johnson*'s "*violent* force" definition dovetails perfectly with the basic purposes of the ACCA: a past use of slight force that is not reasonably expected to cause pain or injury will not make a § 922(g) offender any more likely to deliberately pull a trigger in the future.

Put simply, sustaining the ACCA's mandatory 15-year penalty based on Florida robbery would sweep in a "host" of garden-variety, petty criminal conduct that is "not typically committed by those whom one normally labels 'armed career criminals.'" *Id.* at 146. Doing so would clash with the statute's basic purpose, rigidly mandating severe prison sentences based on glorified pickpocketing, shoplifting, and cash-grabbing. Petitioner's position here would avoid that incongruous and draconian result. And, at the same time, it would still flexibly permit sentencing judges to consider the facts of a defendant's prior robbery offense when exercising their considerable discretion to impose

an individualized sentence up to the ten-year maximum for a § 922(g) offense. *See* 18 U.S.C. § 3553(a).

* * *

In sum, Florida robbery can be committed by only a slight degree of force, and such force is not "*violent* force." Because "*violent* force" is not required to commit Florida robbery, that offense does not have "as an element" the use, attempted use, or threatened use of "physical force." 18 U.S.C. § 924(e)(2)(B)(i). Accordingly, Florida robbery is not a "violent felony" under the ACCA.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed and the case remanded.

Respectfully submitted,

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